Supreme Court, U.S.
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No.

IN THE
SUPREME COURT of the UNITED STATES

SHELLEY S. ROGERS,
Lieutenant Colonel, United States Air Force,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Article 133, UCMJ, 10 U.S.C. § 933, alleging conduct unbecoming an officer and a gentleman, is void for vagueness because neither the military courts nor other military authority narrowed the broad reach of the statute to otherwise innocent conduct between officers?

II. Whether the charge under Article 133, UCMJ, 10 U.S.C. § 933, failed to state an offense because it did not identify specific acts that constituted the alleged conduct unbecoming an officer and gentleman?

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SHELLEY S. ROGERS,
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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

Shelley S. Rogers, Lieutenant Colonel, United States Air Force, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, *United States v. Rogers*, 54 M.J. 244 (C.A.A.F. 2000), is located in Appendix A at 1a-41a. The opinion of the Air Force Court of Criminal Appeals, *United States v. Rogers*, 50 M.J. 805 (AF Ct. Crim App 1999), is located in Appendix B at 42a-58a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on November 8, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(2).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . ..

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.

Article 133 of the Uniform Code of Military Justice (UCMJ) provides:

> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and gentleman shall be punished as a court-martial may direct.

Article 133, UCMJ, 10 U.S.C. § 933.

STATEMENT OF THE CASE

This case involves the constitutionally vague reaches of Article 133, UCMJ, 10 U.S.C. § 933, that prohibits military officers from engaging in conduct that is

"unbecoming an officer and gentleman." As this Court noted in *Parker v. Levy*, 417 U.S. 733 (1974), the literal language of Article 133, UCMJ, 10 U.S.C. § 933, has a very broad reach, governing all sorts of conduct by military officers. But, this Court upheld application of Article 133, UCMJ, 10 U.S.C. § 933, to certain types of improper conduct by officers, noting that military customs and construction of the offense by the military courts and other military authorities have narrowed the broad reach of the Article. Yet, this Court also agreed that there are "still areas within the general confines of the Article's language which have been left vague despite these narrowing constructions." *Parker* at 754. In the over twenty-five years since this Court decided *Parker*, this Court has not examined the vague reaches of Article 133, UCMJ, 10 U.S.C. § 933. This case presents the Court an opportunity to further clarify the constitutional limits on "conduct unbecoming an officer and gentlemen."

The issue in this case involves one area that remains constitutionally vague–the relationships between officers. Here, the Air Force charged the petitioner with conduct unbecoming an officer and gentleman by wrongfully and willfully developing an "unprofessional relationship of inappropriate familiarity" with a subordinate officer in his unit.[1] Neither Air Force custom, the military courts,

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[1] The charge stated:

> In that LIEUTENANT COLONEL SHELLEY S. ROGERS, United States Air Force, 90th Fighter Squadron, at or near Pordenone, Italy, did, between on or about 20 November 1995 and on or about 18 December 1995, wrongfully and willfully develop an unprofessional relationship of inappropriate familiarity with First Lieutenant Julie Clemm, a subordinate under his command, which conduct under the circumstances was unbecoming an officer

regulations, nor other military authority narrowed this offense.

As the then Air Force Court of Military Review[2] stated in *United States v. Kroop,* 34 M.J. 628, 634 (A.F.C.M.R. 1992), "the problems in defining or proving a custom [prohibiting excessive social contacts between officers] is readily apparent. Officers are expected to socialize with each other ... [and] [w]hat one person might regard as 'undue familiarity' or 'excessive social contacts' another person might regard as mere friendly socializing or demonstrations of concerns for one's subordinates."

I. Facts

The petitioner was tried by General Court-Martial and found guilty in 1996 of conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ, 10 U.S.C. § 933. He was sentenced to a reprimand and forfeiture of all pay and allowances for four months.[3]

The events that led to this court-martial occurred while the unit the petitioner commanded, an F-15 Fighter Squadron,[4] was deployed to Italy in the fall of 1995 to fly combat missions over Bosnia. The petitioner's record of outstanding achievement was undisputed, having been selected for early promotion three times in his career, including his below-the-zone promotion to colonel during

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and gentleman.

[2] The Air Force Court of Military Review (A.F.C.M.R.) has been renamed as the Air Force Court of Criminal Appeals (A.F.C.C.A.).

[3] The petitioner was also charged with conduct prejudicial to good order and discipline under Article 134, UCMJ, 10 U.S.C. § 934, but that charge is not implicated in this petition.

[4] The unit Deployed to Italy with approximately 200 personnel, both officer (30) and enlisted (170).

the deployment in December 1995.

It was during this deployment that the petitioner was accused of developing an unprofessional relationship of inappropriate familiarity with First Lieutenant (1Lt) Julie Clemm, the squadron intelligence officer. 1Lt Clemm was new to the squadron and joined the deployment to Italy in mid-November 1995.

The claims of misconduct against the petitioner were primarily raised by Major (Maj) Michael A. Cloutier, a weapons systems officer (navigator) and an Assistant Director of Operations for the squadron, and a small group of his officer friends within the squadron, whom Maj Cloutier called, "the boys." Maj Cloutier was second in command of the squadron during the deployment. The petitioner had recently counseled or reprimanded all of these officers for inappropriate conduct during the deployment.

The charge did not specify any acts or conduct that allegedly constituted the conduct unbecoming an officer and gentleman, but a bill of particulars included: allegations that the petitioner had frequent off-duty contacts with 1Lt Clemm--including riding in a car rented by the squadron for transportation during the deployment; allegations that petitioner behaved inappropriately toward 1Lt Clemm at a squadron Thanksgiving party and put his arm around her while standing around a bonfire with other squadron personnel that evening; and testimony from several officers concerning their "perception" of the petitioner's behavior.[5]

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[5] The original charges also included a charge of adultery against the petitioner, but the government dropped that charge before trial, as well as several others, because they had *no admissible evidence* to support the allegation. While investigating the adultery charge, the government compelled 1Lt Clemm to cooperate under a grant of immunity. She

A copy of the bill of particulars is printed at Appendix C.

II. Proceedings Below

At trial, the petitioner challenged the charge because it failed to plead any custom or regulation that would narrow the broad reach of Article 133 to otherwise innocent conduct between officers. He also challenged the charge because it failed to allege any acts upon which the offense was based. Finally, the petitioner vigorously contested the evidence presented at trial. He challenged the credibility of the key government witnesses; he testified and denied any inappropriate behavior or relationship with 1Lt Clemm; and he presented the testimony of many officers and enlisted personnel from the squadron who stated that they saw no inappropriate behavior between their commander and 1Lt Clemm.[6] 1Lt Clemm also testified at trial and denied any inappropriate behavior or relationship between the two.

On Appeal to the Air Force Court of Criminal Appeals (A.F.C.C.A.), the petitioner challenged the charge of conduct unbecoming an officer and gentleman because it was unconstitutionally vague and failed to state an offense. He also challenged the sufficiency of the evidence supporting the charge. The Air Force Court rejected this

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stated under oath that she *had not committed adultery*; she also *denied engaging in any other inappropriate conduct* with the petitioner. She repeated this testimony at trial.

[6] The following individuals testified that they saw no inappropriate behavior between the petitioner and 1Lt Clemm: Capt Lovrak, MSgt Sanchez, Capt Burg, Capt Reesman, Capt Jaasma, Capt Bennett, SMSgt Adams, MSgt Keiholz, MSgt Kowski, Capt Hume, SSgt Warner, TSgt Conners, SrA Gaultney, TSgt Deview, TSgt Wood, TSgt Myers, TSgt Deardorff.

appeal holding that the petitioner had adequate notice regarding the charge that he committed conduct unbecoming an officer and gentleman by developing an unprofessional relationship of inappropriate familiarity with 1Lt Clemm. *United States v. Rogers*, 50 M.J. 805 (AF Ct. Crim App 1999). The Air Force Court also concluded that the charge stated a course of conduct offense and did not need to specify any acts of the alleged unprofessional relationship of inappropriate familiarity. *Id.* at 809. The A.F.C.C.A. also rejected the petitioner's challenges based on the sufficiency of the evidence presented at trial. *Id.* at 812.

Petitioner also brought these claims on his appeal before the United States Court of Appeals for the Armed Forces[7] (C.A.A.F.). *United States v. Rogers*, 54 M.J. 244 (C.A.A.F. 2000) The C.A.A.F. rejected petitioner's claims that the charge was unconstitutionally vague and did not allege any wrongful acts. The Court also rejected his challenge to the sufficiency of the evidence by a vote of four to one.

Judge Effron dissented, finding the evidence legally insufficient to support the charge. He stated, "... [t]he evidence reflected the *speculation* of others as to the possibility of an inappropriate relationship, but did not provide a legally sufficient basis upon which a reasonable factfinder could have concluded, beyond a reasonable doubt, that [petitioner's] conduct with 1Lt Clemm crossed the line from permissible interaction to an illegal unprofessional relationship of inappropriate familiarly." *Rogers*, 54 M.J. at 262 (Effron, J. concurring in part and dissenting in part) (emphasis added). While Judge Effron

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[7] This Court was formerly named the United States Court of Military Appeals (C.M.A.).

concluded that there is a line between permissible and impermissible interaction between officers, his finding that the petitioner *did not cross that line* while others, relying on the same conduct, concluded that it *did cross the line* between permissible and impermissible conduct between officers demonstrates just how difficult it is to ascertain what conduct between officers is permissible and what conduct is not.

In its majority opinion, the C.A.A.F. acknowledged, "there will be many gradations of relationships and associations between servicemembers that will not put the parties fairly on notice that the conduct might be inappropriate." *Rogers*, 54 M.J. at 257. The C.A.A.F. cited a nonpunitive[8] Air Force regulation that suggested, "*senior members should not date* or be personally obligated or indebted to junior members." *Id.* (emphasis original). The Court then stated that it "decline[d] to attempt to walk a line between 'dating' and the evidence adduced at [petitioner's] court-martial." *Id.* at 257, n 25. The C.A.A.F. quoted this Court, noting that there is certain conduct to which Article 133, UCMJ, 10 USC § 933, "clearly applies without vagueness or imprecision." The C.A.A.F. then simply concluded, *without analysis of the facts*, that "under the circumstances of this case, we are satisfied that [petitioner's] conduct falls into the latter category. Any officer would be on notice that this type of

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[8] A *punitive* regulation is a regulation that is intended to regulate the conduct of individual servicemembers, and the direct application of sanctions for violations of the regulation must be self-evident. A *nonpunitive* regulation is one that supplies only general guidelines or advice for conducting military functions and may not be enforceable under Article 92(1), UCMJ, 10 U.S.C. § 892 (criminal offense of violating a lawful general regulation). *United States v. Shavrnoch*, 49 M.J. 334, 336 (C.A.A.F. 1998).

behavior was punishable." *Id.* at 257.

REASONS FOR GRANTING THE PETITION

I. Article 133, UCMJ, 10 U.S.C. § 933, alleging conduct unbecoming an officer and a gentleman, is void for vagueness because neither the military courts nor other military authority narrowed the broad reach of the statute to otherwise innocent conduct between officers.

The petitioner, so far as can be ascertained by a review of reported military opinions, is the only officer that has been punished by Court Martial for conduct unbecoming an officer and gentleman for an "unprofessional relationship of inappropriate familiarity" with a subordinate officer when that alleged improper relationship did not involve allegations of violations of other UCMJ provisions, such as adultery.

This case involves a fundamental due process question of when an allegation must be struck down because it is unconstitutionally vague. The "void for vagueness" doctrine "incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Parker v. Levy,* 417 U.S. 733, 753 (1974)(citations omitted).

Article 133, UCMJ, 10 U.S.C. § 933, prohibits officers from engaging in "conduct unbecoming an officer and gentleman." In *Parker v. Levy*, 417 U.S. 733 (1974), the principal case construing charges under Article 133, 10 U.S.C. § 933, this Court noted that the "literal language" of Article 133, 10 U.S.C. § 933, "had a very broad reach." *Id.* at 752-53. The Court observed that the then Court of Military Appeals "has narrowed the very broad reach of

the literal language" of Article 133, 10 U.S.C. § 933, and at the same time the C.A.A.F. "has supplied considerable specificity by way of examples of the conduct which they cover." *Id.* at 754. However, even with this narrowing construction, the Court acknowledged that there may still be "sizable areas of uncertainty as to the coverage of the articles." *Id.* This is such a case.

The *Parker* Court recognized "the factors differentiating military society from civilian society," and described the proper standard of review for a vagueness challenge to Article 133, UCMJ, 10 U.S.C. § 933:

> Void for vagueness simply means that criminal responsibility should not attach where *one could not reasonably understand that his contemplated conduct is proscribed.* In determining the sufficiency of the notice a statute must of necessity be examined *in light of the conduct* with which a defendant is charged.

417 U.S. at 756-57, (emphasis added) *quoting United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33, (1963) (citations omitted). *See also United States v. Dear*, 40 M.J. 196 (C.M.A. 1994)(upholding a charge of maltreatment of a subordinate under Article 93, UCMJ, 10 U.S.C. § 893); and *United States v. Norvell*, 26 M.J. 477, 480 (C.M.A. 1988)(upholding a charge of conduct unbecoming an officer and gentleman under Article 133, UCMJ, 10 U.S.C. § 933, when officer catheterized herself to conceal use of marijuana and explained how to avoid such detection to an enlisted person). The C.A.A.F. has applied this void for vagueness standard holding that "[t]he primary obstacle to prosecuting a servicemember under the general article is that the servicemember must be on 'fair notice' that his conduct was punishable under the Uniform Code."

United States v. Bivins, 49 M.J. 328 (C.A.A.F. 1998).

In *Parker*, this Court upheld charges under Article 133 and Article 134, UCMJ, 10 U.S.C. § 933 and § 934, that charged Captain Levy, an Army physician, with conduct unbecoming an officer and gentleman and conduct prejudicial to good order and discipline. The charges stemmed from Captain Levy's statements to enlisted personnel denouncing the United States' participation in the Viet Nam War and urging the enlisted personnel to refuse to go to or fight in Viet Nam.

This Court held that Captain Levy had fair notice that his conduct violated the Articles and that they were not void for vagueness as applied to him. The Court found the notice in two sources: prior decisions by the then Court of Military Appeals and in language in the Manual for Courts-Martial. Among the Court of Military Appeals decisions the Court cited was *United States v. Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972), applying Article 134, UCMJ, 10 U.S.C. § 934, to calls for active opposition to the military policy of the United States. Additional notice was found in the Manual for Courts-Martial. Under Article 134, UCMJ, 10 U.S.C. § 934, the Manual stated, "certain disloyal statements by military personnel" may be punished and noted as an example "utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government." *Parker* at 753.

The petitioner's case can be distinguished from *Parker*. Unlike *Parker*, there was no prior opinion by the military courts, no examples from the Manual for Courts-Martial, and no relevant custom of the service, regulation, or other military authority to give the petitioner adequate notice

that otherwise innocent conduct between he and his subordinate officer would fall within the reach of Article 133, UCMJ, 10 U.S.C. § 933. To the contrary, the leading opinion from the military appellate courts specifically held that an officer *could not* be held criminally accountable under Article 133, UCMJ, 10 U.S.C. § 933, for excessive social contacts with a subordinate officer.

In *United States v. Kroop*, the Air Force similarly court-martialed an officer for conduct unbecoming an officer and gentleman for "excessive social contacts"[9] with a subordinate officer. 34 M.J. 628 (A.F.C.M.R. 1992), 38 M.J. 470 (C.M.A. 1993). In *Kroop*, both military appellate courts *set aside* Lieutenant Colonel Kroop's conviction based on the "excessive social contacts," with a subordinate officer holding, in accordance with *Parker*, that such a charge was too vague to state an offense in the absence of a custom of the service or regulation that prohibited such conduct. *Kroop*, 34 M.J. at 634; 38 M.J. at 473. Moreover, because *Kroop* involved a *guilty plea*, the appellate rulings were made while employing a strict standard of review used to test specifications in guilty plea cases. *See Kroop*, 38 M.J. at 474 (Gierke, J. dissenting). *See also United States v. French*, 31 M.J. 57, 59 (C.M.A 1990) (when a specification is challenged at trial, it is examined much more critically than if challenged for the first time on appeal). This strict standard of review was not applicable to the petitioner's case because he challenged the charge on this principle at the outset of his trial and did not plead guilty.

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[9] *Kroop* included allegations of adultery. That portion of the charge was upheld under Article 134, UCMJ, 10 U.S.C. §934, conduct to the prejudice of good order and discipline in the armed forces, because, like the disloyal statements in *Parker*, adultery is specifically enumerated as an example under Article 134, UCMJ, 10 U.S.C. §934, thus giving adequate notice to servicemembers. *Kroop*, 34 M.J. at 635.

In the absence of a custom or regulation further defining proscribed relationships between officers, the petitioner could not understand what conduct is prohibited. *See Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994) (void for vagueness requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can under what conduct is prohibited). *Accord, Staples v. United States*, 511 U.S. 600, 605 (1994) *citing Morissette v. United States*, 342 U.S. 246, 250 (1952) (before an injury can amount to a crime, individual must be able to "choose between good and evil"). This is particularly true because the offense involved an "unprofessional relationship of inappropriate familiarity" between two officers. Officers are expected to socialize with on another. Indeed, the record is replete with examples of socializing between the petitioner and all of his subordinate officers during the entire deployment.

Much of the evidence in this case focused on an evening in November 1995 when the petitioner's squadron had a Thanksgiving celebration. After the group's meal, the celebration moved to the beach where they made a bonfire. Here, the petitioner was alleged to have put his arm around 1Lt Clemm for a brief period of time.[10] While *repeated, intentional* physical contact of this nature for *extended periods of time* might be evidence of an unprofessional relationship, this brief physical contact, in the setting that it occurred, cannot be the basis of a criminal charge. To convict on such conduct would subject nearly every officer to criminal sanctions for otherwise innocent physical contact with their subordinate officers. This would include a fond greeting, a celebratory

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[10] The petitioner vigorously challenged the evidence surrounding this incident at trial. Both he and 1Lt Clemm, as well as others present, testified that it did not occur.

embrace, a slap on the back or hand on the shoulder for encouragement, or a simple goodbye hug. In fact, the record shows us that the petitioner's number two officer in command during the deployment, Maj Cloutier, posed for a photo *with his arm around 1Lt Clemm* this very same evening that the petitioner is alleged to have improperly had his arm around 1Lt Clemm. Further, 1Lt Clemm gave Maj Cloutier a birthday hug, and Maj Cloutier indicated he often hugged women as a greeting, yet he was not subject to criminal allegations of inappropriate conduct.

In addition to the events of the squadron Thanksgiving party, the Air Force Court noted that the petitioner and 1Lt Clemm went to the gym and ate at restaurants together. *Rogers*, 50 M.J. at 811. Yet, the Court did not articulate how these facts are evidence of an unprofessional relationship. Indeed, just two pages earlier in their opinion, the Air Force Court stated, "such acts could be perfectly legal." *Id.* at 809. In fact, the evidence at trial indicated that *all of the officers in the squadron* traveled together in cars, worked out at the gym together, and went out to dinner. There simply is nothing improper about this conduct. Indeed, such conduct is quite common for a deployed unit where there are limited transportation resources and group activities are widely encouraged.

The then Air Force Court of Military Review touched on this problem in *Kroop*. The Court said:

> The problem in defining or proving such a custom is readily apparent. *Officers are expected to socialize with each other.* Officers may date other officers, treat each other with various degrees of intimacy, and marry each other. *What one person might regard as "undue familiarity" or "excessive social contacts" another person might regard as mere friendly*

socializing or demonstrations of concern for one's subordinates.

34 M.J. at 634 (emphasis added).

Moreover, unlike the officer/enlisted fraternization offense which is specifically defined in the Manual for Courts-Martial (1995), Part IV, paragraph 83, and which has been construed in numerous appellate decisions, no such legal history can be found defining officer/officer unprofessional relationships that are considered criminal. Furthermore, violation of a custom of the service is an essential element of fraternization offenses prosecuted under Article 134, UCMJ, 10 U.S.C. § 934. No comparable element was included under the Article 133, UCMJ, 10 U.S.C. § 933, offense that the petitioner faced.

This Court has explained why vague laws are Constitutionally impermissible:

> Vague laws offend several important values. First because we assume that man is free to steer between lawful and unlawful conduct, *we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.* Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. *A vague law impermissibly delegates basic policy matters* to policemen, judges, and juries *for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discrimination application.*

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (emphasis added). *See also City of Chicago v. Morales*, 527

U.S. 41, 63-64 (1999)(Chicago's Gang Congregation Ordinance stuck down as unconstitutionally vague in failing to give notice and providing absolute discretion in police officers to determine what activities constituted prohibited loitering); *Parker*, 417 U.S. at 752.

The facts of petitioner's case demonstrate both evils of such a vague charge as an "unprofessional relationship of inappropriate familiarity" between officers. Not only was the petitioner not provided adequate notice of what type of social contacts between officers would subject him to a *criminal* allegation, the "unprofessional relationship of inappropriate familiarity" charge was arbitrarily and discriminatorily applied against him when the record clearly demonstrates others, including his prime accuser, committed acts which were virtually identical to the allegations against the petitioner.[11] As noted above, the very same evening that the petitioner allegedly put his arm around 1Lt Clemm at the bonfire–a charge both he and 1Lt Clemm denied under oath–Maj Cloutier was photographed with *his arm around 1Lt Clemm.* Further, in his testimony, Maj Cloutier admitted that he often hugged women, including 1Lt Clemm, yet he was not similarly charged

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[11] The petitioner's case preceded the now infamous "Kelly Flinn" case involving allegations of adultery, fraternization, and false official statements against the Air Force's first female B-52 pilot. While the alleged improper conduct was different in the Flinn matter, the Air Force was widely criticized for *disparate application* of adultery charges against women. An official Air Force memorandum released on 16 July 1997, by the Secretary of the Air Force and Chief of Staff, *after the trial in this case* and after the Flinn matter, encouraged commanders to draw on a wide range of responses to allegations of fraternization and unprofessional relationships. The memorandum noted that court-martial was appropriate only "in the most aggravated cases." *See United States v. Clack*, 47 M.J. 813 (AF Ct. Crim App 1998).

with developing an "unprofessional relationship of inappropriate familiarity."

The A.F.C.C.A. and C.A.A.F. claimed that an Air Force regulation defined the term "unprofessional relationship" with adequate specificity (50 M.J. at 808; 54 M.J. 256-57) to overcome the petitioner's challenge to the charge as vague. However, the Air Force regulation, Air Force Instruction (AFI) 36-2909 (App. D), did not adequately define the term "unprofessional relationship." This is illustrated by the fact that this regulation was revised on 1 May 1996, between the time of the alleged offense and the petitioner's trial. The revised regulation "provided *additional guidance on activities and situations that lead to or constitute unprofessional relationships*," and "provided expanded guidance on administrative actions which may be initiated as a result of unprofessional relationships." App. E (emphasis added). Even the May 1996 regulation has undergone significant revision as the military services have grappled with clearly defining inappropriate social contacts in the wake of media attention.[12]

The current version of the regulation was published on 1 May 1999, "substantially revis[ing]" the May 1996 version

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[12] On 10 June 1997, Secretary of Defense William Cohen announced three initiatives "to ensure policies governing good order and discipline are *clear* and fair." One of these specifically set out "*to review the clarity of existing guidance* on adultery under the UCMJ." Secretary Cohen's remarks indicated, "*recent perceptions that our system is inconsistent damage the morale of our troops.*" In referring the matter to the General Counsel for review, Secretary Cohen noted, "recent events suggest *the need to review the clarity of existing guidance* related to adultery under the Uniform Code of Military Justice." This lack of clarity is all the more palpable when the charge of an "unprofessional relationship of inappropriate familiarity," as in Lt Col Rogers's case, does not involve allegations of sexual misconduct, including adultery.

that it superceded. This version specifically includes a requirement that all personnel be trained on this policy and receive annual briefings. AFI 36-2909, paragraph 9. App. F. In fact, the official training program for this regulation includes the following note, "[e]xperience has shown that most violations of the Air Force policy on Professional Relationships stem from inexperience or unfamiliarity with the policy and can be easily and quickly corrected through education." App. F.

Article 133, UCMJ, 10 U.S.C. § 933, as applied to the petitioner in this case is void for vagueness and must be dismissed. The petitioner's fundamental right to due process was violated when the government charged him with and convicted him of conduct unbecoming an officer and gentleman for maintaining an "unprofessional relationship of inappropriate familiarity" with his subordinate officer, 1Lt Julie Clemm. "Citizens in uniform may not be stripped of their basic rights simply because they have doffed civilian clothes." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (*quoting* Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 188 (1962)). The petitioner must not be stripped of his most basic right of due process.

II. The charge under Article 133, UCMJ, 10 U.S.C. § 933, failed to state an offense because it did not identify specific acts that constituted the alleged conduct unbecoming an officer and gentleman.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." *See, e.g., In re Oliver*, 333 U.S. 257, 273 (1948) (right to reasonable notice of charges); *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (due process requires notice of essential

elements). In this case in addition to its vagueness as raised above, the charge under Article 133, UCMJ, 10 U.S.C. § 933, also did not identify any acts constituting the alleged conduct unbecoming an officer and gentleman. Although the charge alleged the petitioner developed an "unprofessional relationship of inappropriate familiarity" with a subordinate officer, there is no way, given the current state of the record of trial, to determine what acts the court members found that petitioner committed beyond a reasonable doubt that amounted to the "unprofessional relationship of inappropriate familiarity."

In *Russell v. United States*, 369 U.S. 749 (1962), this Court stated, "basic principles of fundamental fairness retain their full vitality under modern concepts of pleading." 369 U.S. at 765-66. In reversing six separate convictions based on motions to quash indictments brought under 2 U.S.C. § 192, this Court expressed the recognized notion that an indictment cannot stand that fails to identify the relevant "core of criminality" and where "guilt depends so crucially upon a specific identification of fact." 369 U.S. at 764. The Court added:

> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. *It enables his conviction to rest on one point and the affirmance of the conviction to rest on another.* It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise and conjecture.

369 U.S. at 766 (emphasis added). *See also United States v. Murphy*, 762 F.2d 1151 (1st Cir. 1985)(indictment for threatening a witness in an official proceeding under 18 U.S.C. § 1512 was defective because it did not identify the *particular* proceeding and therefore did not adequately

apprise defendants of charges against them).

Russell also made it clear that providing a bill of particulars (Appellate Exhibit 10 in this case) is inadequate to remedy this problem, by stating, "it is a settled rule that a bill of particulars cannot save an invalid indictment." 369 U.S. at 770, *Murphy* at 1154.

This Court described the problem with a defective charge that leaves the core of criminality undefined in a recent case while construing the "continuing criminal enterprise" violation under 21 U.S.C. § 848. *Richardson v. United States*, 526 U.S. 813 (1999). In *Richardson*, the Court noted that the government, by not specifically alleging *which acts* violated the law and constituted a continuing criminal enterprise,

> *permitt[ed] a jury to avoid discussion of the specific factual details of each violation [and] will cover-up wide disagreement among the jurors about just what the defendant did, or did not, do.* The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, *unless required to focus upon specific factual detail, will fail to do so,* simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

Id. at 819 (emphasis added).

The charge against the petitioner alleging conduct unbecoming an officer and gentleman by developing an "unprofessional relationship of inappropriate familiarity" highlights the need for the government to identify the alleged improper acts. Both military appellate courts rejected this notion. The Air Force Court described this as a "course of conduct offense" in deciding that it was not

necessary for the prosecution to allege or for the members to vote on and find specific acts of this so-called "unprofessional relationship of inappropriate familiarity." *Rogers*, 50 M.J. at 809. The C.A.A.F. stated that the "acts" did not constitute the "unprofessional relationship of inappropriate familiarity," they evidenced it. *Rogers*, 54 M.J. at 257. Under the rationale of both courts, the jurors were not required to discuss any specific facts while deliberating on this charge.

Here, both considerations noted in *Richardson* are present. First, the failure to allege any specific acts in the charge improperly allowed the jurors to agree on the charge even if they widely disagreed about what the petitioner did or did not do–facts that were vigorously contested at trial. What did the petitioner do–by way of *acts*–in his relationship with his subordinate officer–that amounted to "conduct unbecoming an officer and gentleman?" Did going to the gym one time and playing racquetball with her qualify? Did riding to or from the wing operations center in a car with her qualify? Did talking to her on the telephone twice late at night qualify? Did briefly putting his arm around her at a bonfire qualify? Did any of these events occur beyond a reasonable doubt? What combination of events must have existed before an "unprofessional relationship of inappropriate" was achieved?

Because no acts were pled in the charge against the petitioner, there was no objective standard by which these questions could be factually resolved. To the extent the court members answered these questions, there is no record upon which to test their findings against the evidence.

Richardson also articulated a second consideration that is present when the government does not specifically allege

which acts constituted "conduct unbecoming an officer and gentleman." Without such acts identified in the charge, the jurors are left to conclude from testimony, "where there is smoke there must be fire." *Richardson* at 819.

The petitioner's record is full of such "smoke" as the subordinate officers who testified against him were all allowed to testify that they *perceived* that something improper was going on. The following question, asked by a court member,[13] demonstrates that the case against the petitioner was based on perception:

> On numerous occasions during Maj Cloutier's testimony, he referred to "incidents" and the "situation". Much of his testimony seems to be based on crewmember assumptions and perceptions. Question: Can Maj Cloutier provide some specific facts concerning "incidents" or the "situation" which support the allegation of "unprofessional relationship of inappropriate familiarity?

Appellate Exhibit XXIX (emphasis original).

Indeed, both lower appellate courts cited this *perception* as significant in finding that the petitioner committed the offense. *Rogers*, 50 M.J. at 811, 54 M.J. at 249. Yet, many of these individuals had no actual knowledge of any improper actions by the petitioner.

On this item, the Air Force Court noted,

> Several officers in the squadron *believed* the accused and 1Lt Clemm spent an inordinate amount of time

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[13] In the military, a court member is detailed by the convening authority to serve on a panel as a juror for the court martial. The court members determine whether the accused is guilty and, if necessary, determine a proper sentence. R.C.M. 502(a).

> together. They *seemed* to travel back and forth between the hotel and the squadron together on a regular basis. They went to the gym and ate at restaurants together.

50 M.J. at 811 (emphasis added). Here, the Air Force Court did not find as fact that the petitioner and 1Lt Clemm spent an inordinate amount of time together, but referred to the officers' *"belief"* and their testimony that the petitioner and 1Lt Clemm *"seemed"* to travel back and forth between the hotel and the squadron together on a regular basis. Later in the opinion, the Air Force Court noted, "[s]everal subordinate officers warned the accused of the *perception* that he was carrying on an affair with Lt Clemm. The accused took no action to change his behavior or alleviate the concerns of his subordinates." *Rogers*, 50 M.J. at 812. The witnesses' subjective belief or perceptions, without factual evidence to support their opinions, cannot be the basis of the petitioner's *criminal* conviction. *See United States v. Hecker*, 42 M.J. 640, 644 (AF Ct. Crim App 1995)(an individual cannot be found *criminally* guilty on an "appearance" of impropriety).

Nothing illustrates this better than Judge Effron's dissent. He noted that the evidence "reflected the *speculation of others* as to the possibility of an inappropriate relationship, but did not provide a legally sufficient basis upon which a reasonable factfinder could have concluded, beyond a reasonable doubt, that appellant's conduct crossed the line from permissible interaction to an illegal unprofessional relationship of inappropriate familiarity." *Rogers*, 54 M.J. at 262 (Effron, J. dissenting) (emphasis added).

Further, the Air Force Court noted that the petitioner and 1Lt Clemm went to the gym and ate at restaurants

together. However, the Court did not articulate how these facts are evidence of an unprofessional relationship. Indeed, just two pages earlier in the opinion, the Air Force Court stated, "such acts could be perfectly legal." *Rogers*, 50 M.J. at 809.

In fact, a review of the entire record on the allegation that the frequency of contacts between the petitioner and 1Lt Clemm somehow supported the Article 133, UCMJ, 10 U.S.C. § 933, conduct unbecoming charge demonstrates that, although several squadron members subjectively believed that the frequency was inappropriate, the prosecution *did not present any evidence* to support their subjective beliefs. Instead, because the charge did not include specific factual allegations, it allowed the government to rely on the witnesses' subjective beliefs. One witness's testimony, reproduced below, vividly demonstrates the lack of *actual evidence* against the petitioner:

> A: I told [Lt Col Rogers] that I, in my opinion, his relationship with Lieutenant Clemm was inappropriate, and I just wanted to let him know that I thought it was inappropriate.
> Q: What had you seen yourself, with regard to that relationship, that caused you to bring this up, other than what others may have told you, what did you see personally?
> A: Well, a couple of times, driving in his car together, just the two of them alone. His attitude towards the rest of us in discussing her, seemed to be more defensive in nature than I would have expected. *It was just a general impression I had.*
> Q: What about other than riding in his car, were there other places that you had seen them?
> A: *I saw them at the Wing Operations Center one*

time together.
Q: Is that off duty?
A: *No, that was on duty.*
Q: Okay. What about off duty contacts? Did you ever see them in the gym together?
A: *I saw them come back from the gym together. I did not see them at the gym together.*

Trial Record, Vol. IV, p. 493 (emphasis added).

The charge in this case failed to sufficiently apprise the petitioner of the nature and cause of the accusation against him. While the charge contained a general description of the offense, it was not accompanied with a statement of the facts and circumstances to inform the petitioner of the offense he was charged with. *Russell*, 369 U.S. at 765. Not only did the charge fail to adequately inform the petitioner, it failed an important corollary purpose in that it did not "inform the court of the facts alleged, so that [the court] may decided whether they are sufficient in law to support a conviction, if one should be had." *Id.* at 768. As a consequence, not only was the petitioner deprived of defending against the nature and cause of the accusation against him at trial, he has been deprived of meaningful appellate review as the appellate courts have been unable to "bring an enlightened judgment" to the task of evaluating the sufficiency of the evidence against him. *Id.* at 769.

CONCLUSION

The charge of conduct unbecoming an officer and gentleman in this case cannot be upheld. Article 133, UCMJ, 10 U.S.C. § 933, is unconstitutionally vague because it has broad reach to otherwise innocent conduct between officers and has not been sufficiently narrowed by the military courts or other military authority. This broad reach causes indiscriminate application of Article 133,

UCMJ, 10 U.S.C. §933, undermining belief that the military justice system will be applied in a fair and evenhanded manner. Moreover, the charge was insufficient because it did not give reasonable notice of the allegation against the petitioner. Consequently, without such specificity, the jurors possessed no clear factual basis upon which to reach their finding. Finally, appellate courts, including this Court, are unable to perform reasoned appellate review given the charge and the evidence in the record of trial.

Petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Armed Forces.

Respectfully submitted,

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